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The Secret War in Central America

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It is a pity that John Norton Moore's encyclopedic article, "The Secret War in Central America and the Future of World Order," *American Journal of International Law*, January 1986, Vol. 80, No. 1, was not available before the recent debate in the House on President Reagan's request for aid to the contras. Moore's article—85 pages long, supported by 344 footnotes—is by far the most comprehensive treatment of the subject that this reviewer has come across. It is also, by a substantial margin, the longest article that the *Journal of International Law* has ever published. It deals with all aspects of the problem and provides heavily documented answers to all the questions that were the subject of the recent congressional debate. The article is must reading for everyone who pretends to have an informed opinion on Central America.

John Norton Moore has served as counselor on international law to the Department of State, as a United States ambassador to the Third United Nations Conference on the Law of the Sea, and as special counsel for the United States in the Nicaragua case before the International Court of Justice. He is at present the director of the Center for Law and National Security at the University of Virginia and chairman of the ABA Standing Committee on Law and National Security.

Moore starts his article with the observation that the "core principle of modern world order is that aggressive attack is prohibited in international relations and that necessary and proportional force may be used in response to such an attack." He believes that the United States would have been better advised to pursue the proceedings of the International Court of Justice in the case brought against it by the Nicaraguan government. This, despite the fact, or, rather precisely because of the fact that he is "convinced that Nicaragua's principal objective in going to the Court was to reap a propaganda victory."

Before proceeding to his basic argument under international law, Moore first establishes the central facts in the case. He warns that the issue cannot be couched simply in terms of Nicaragua versus the United States because what is involved is the broader issue of the right of national defense against secret or indirect aggression and the right of collective regional defense under Article 51 of the UN Charter and Article 3 of the Rio Treaty.

Is the hostility of the Sandinistas towards the United States a product of an unfriendly American attitude towards those who overthrew the Somoza regime? Nothing could be further from the truth, according to Moore. He points out that the U.S. cut off military assistance to Somoza in 1977; that it initiated the 1979 OAS resolution, calling on the OAS member states to recognize the Nicaraguan insurgents; that during the first two years of the Sandinista government the U.S. gave it \$118 million in economic assistance, and, in addition, supported \$292 million in World Bank and Inter-American Development Bank loans to the Nicaraguan government; that in August of 1981 President Reagan offered to renew economic assistance in exchange for Sandinista termination of support for the Salvadoran guerrillas; that there was no significant military opposition to the Sandinistas until the spring of 1982, over a year and a half after they had opened a sustained secret war against El Salvador. In October of 1982, the U.S. and eight other democratic governments in the Americas joined in the San Jose Declaration which made a proposal outlining the essential conditions for peace in the area, with primary emphasis on free elections and human rights. The Sandinistas refused to even meet with the group spokesmen.

As late as June 1984, Moore notes, Secretary of State Shultz visited Managua to propose discussions, and U.S. Ambassador Shlaudeman in fact held nine meetings with the Sandinistas. But it was all to no avail because

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cause the Sandinistas from the first were ideologically committed to the establishment of a totalitarian regime; to the proposition that U.S. imperialism was the source of all evil, and that the enemies of the United States were therefore its allies; and to the objective of "a revolution without frontiers."

Even before they took power in Nicaragua, the Sandinistas issued a joint statement on March 6, 1978, with the Democratic Front for the Liberation of Palestine attacking "yankee imperialism and the racist regime of Israel," as well as the Nicaraguan government. To consummate this relationship, Yasser Arafat in July of 1980 made a "state visit" to Nicaragua for the purpose of formalizing full diplomatic ties.

Not merely did the Sandinista regime go out of its way to underscore the fact that all enemies of the United States are, by virtue of that fact, friends of the Nicaraguan government, but in UN voting they have outdistanced all the other Soviet satellites in their support of the Soviet line and in their opposition to all initiatives supported by the United States. In January of 1982, when delegates from the Polish labor movement Solidarity were touring Latin America, they were refused permission to enter Nicaragua. Obviously in solidarity with the Soviet Union, the Sandinista government, although it is Marxist-Leninist, threw its recognition to Taiwan rather than to the People's Republic of China.

The recounting of these facts makes nonsense of the charge that we have not given diplomacy a sufficient chance in Central America. They also suggest commitment to a policy which is being determined by Moscow and Havana. Certainly the record of exchange visits and military assistance tend to confirm this assumption. In addition to the one million pounds of war material which, according to various intelligence estimates, entered Costa Rica from Cuba during the six to eight weeks before the end of the Nicaraguan war in 1979, there has been massive confirmation of the continuing military buildup in Nicaragua, and of Nicaraguan involvement in the training, arming and direction of Salvadoran guerrillas and of guerrilla bands in Honduras, Guatemala and Costa Rica.

Moore points out that whereas the UN Charter specifically permits collective defense to deal with armed aggression, the Rio Treaty, on which the defense of the inter-American system is based, goes beyond the UN Charter in "creating a legal obligation . . . to assist in meeting the armed attack." (Emphasis added.) It specifies that "each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligations contained in the preceding paragraph" and it specifies that these self-defense measures shall be valid "until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security."

Moore points out that the Rio Treaty is as applicable in dealing with secret aggression as it is in dealing with conventional aggression. If it were not, he says, we would be encouraging "conflict and 'indirect' aggression by convincing states that such aggression is free from substantial risks: if it works, they will win; if it fails, there is no significant risk and they can try again."

As to the requirement of "proportional" response, Moore says, "it is difficult to understand how a response in kind that is considerably more restrained than the attack and that has not yet stopped the attack is somehow disproportionate. As we have seen, Cuba and Nicaragua are not bound by any such constraints as limit the U.S. response. Most importantly, the contras' response meets the test of proportionality, for it has blunted the attack, but not yet ended it."

Moore points out that, while the Sandinistas (and their clients, the FMLN insurgents in El Salvador) have repeatedly spurned calls for free elections and guarantees of human rights, the contras for their part have repeatedly called for internationally observed free elections and have even agreed that the commandantes should continue in power while such elections are held. In their "Document on National Dialogue of the Nicaraguan Resistance," which was promulgated on March 2, 1985, the contras spoke of "Suspension of armed activities, with a cease fire *in situ*; lifting of the state of emergency; absolute freedom of expression and assembly; general amnesty and pardon for political crimes and related crimes; entry into effect of the right of asylum and habeas corpus . . ." To all of which the Sandinistas have replied with a cold "nyet."

As for the case brought by Nicaragua before the International Court of Justice, Moore believes that the handling of this case by the Court may be regarded as "one of the greatest failures of adjudication in history" in that it "actually gives assistance to a nation engaged in an ongoing armed attack against its neighbors!" In its handling of the case, said Moore, "the Court is severely risking both its own integrity and the rule of law."

These are strong words, but Moore presents an impressive array of facts in support of this finding. First he notes that the Court's jurisdiction is based on the consent of the parties to the dispute. Secondly he notes that the Court lacks jurisdiction because Nicaragua had never accepted the Court's compulsory jurisdiction, as is required of any plaintiff before the Court. He refers to the "remarkable assertion by Nicaragua in oral argument that its acceptance of the jurisdiction of the Permanent Court must have been lost at sea in World War II." This argument, he said, "in the face of no supporting evidence and 40 years of failure to rectify the problem, is an insult to the judicial process." He notes that the Court entertained the request for \$375 million in alleged damages for contra attacks (which is slightly over one-third of the amount of damage inflicted on El

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Salvador by the Nicaraguan-supported guerrillas)—despite widely accepted support for the proposition that a complainant should not be permitted to recover damages if that complainant has been guilty of identical violations. He notes that "to go forward in the absence of El Salvador and the other states attacked by Nicaragua would prejudice the rights of those absent states," and that the Court order had the effect of impairing the right of self-defense against an ongoing armed attack. Such an order, he said, could not be made without a prior determination of the facts establishing who is attacking and who is defending. As matters stand, he said, Nicaragua is in the ridiculous position of attempting to persuade the world that "it all started when he hit me back."

This brings us back to the nature of secret war. In his closing paragraphs John Norton Moore states:

The strategy of covert and combined political-military attack that undergirds this secret war is a particularly grave threat to world order. By denying the attack, the aggressors create doubts as to its existence; and by shielding the attack with a cloud of propaganda and misinformation, they focus world attention on alleged (and sometimes real) shortcomings of the victimized state and the permissibility of defensive response. The result is a politically "invisible attack" that avoids the normal political and legal condemnation of aggressive attack and instead diverts that moral energy to condemning the defensive response. In a real sense, the international immune system against aggressive attack becomes misdirected instead to defensive response.

Aggressive attack—particularly in its more frequent contemporary manifestation of secret guerrilla war, terrorism and low intensity conflict—is a grave threat to world order wherever

undertaken. That threat is intensified, however, when it is a form of cross-bloc attack in an area of traditional concern to an opposing alliance system. That is exactly the kind of threat presented by an activist Soviet-bloc intervention in the OAS area.

The remedy for strengthening world order is clear: return to the great vision of the founders of the UN and OAS Charters. Aggressive attack, whether covert or overt, is illegal and must be vigorously condemned by the world community, which must also join in assisting in defense against such attack. At a minimum, it must be understood that an attacked state and those acting on its behalf are entitled to a right of effective defense to end the attack promptly and protect self-determination.

Meanwhile, the apparatus of a totalitarian police state is rapidly being put in place, including a Cuban-style internal security system down to the block level. The labor movement has been suppressed. Attacks on the church and religious freedom have become routine. Attacks on the semi-autonomous Indians of the Atlantic region, including mandatory relocation, have been on a genocidal level. The state has been replaced by the Sandinista Party. The right of habeas corpus has been revoked and people are subject to stand trials by "people's courts." No wonder that, despite the tendency of Central Americans to stay put under previous tyrannies, at least 120,000 Nicaraguans had fled the country by the end of 1984.

The congressional debate about Central America has strangely omitted the Cuban-Nicaraguan secret war against neighboring states. Congress has debated contra assistance as though it arose in a vacuum rather than as a reluctant defensive option against a determined and continuing armed attack. This article should be read to return the debate to the real world.

—David Martin

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